IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-458

STATE OF NEW JERSEY, pursuant to § 12(b) of the New Jersey Antitrust Act, N.J.S.A. 56:9-12(b),

Petitioner,

vs.

GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY, and CHRYSLER CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, State of New Jersey, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 22, 1974.

Opinions Below

The unpublished orders and opinions of the United States Court of Appeals for the Seventh Circuit and the

United States District Court for the Northern District of Illinois appear in the Appendix hereto.

Jurisdiction

The order of the Court of Appeals was entered on July 22, 1974. No motion for reconsideration was filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the District Court may deny, as in conflict with Rule 23 Federal Rules of Civil Procedure, the State of New Jersey's motion to amend its complaint which sought to assert powers granted to the State by Section 12(b) of the New Jersey Antitrust Act, and thereby subvert, (a) the historical power reserved to the states to control their governmental subdivisions and agencies; (b) the constitutional and statutory power of the State of New Jersey to control its governmental subdivisions and agencies in accordance with Rule 17(b) of the Federal Rules of Civil Procedure; and (c) the right of a state to create centralized antitrust enforcement.

2. Whether the denial of the amendments in the circumstances of this action is a final appealable order pursuant to 28 U.S.C. § 1291 within the meaning of the *Cohen* doctrine.

Constitutional and Statutory Provisions Involved

The underlying constitutional principle involved in the instant case is the Tenth Amendment to the United States Constitution which provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The relevant statutes involved include 28 U.S.C. § 1291 and the New Jersey Antitrust Act, N.J.S.A. 56:9-1 *et seq.*, particularly Section 12(b), which states, in relevant part:

> "The Attorney General, on behalf of the State or any of its political subdivisions or public agencies, or the political subdivision or public agency at the direction of or with the permission of the Attorney General, may institute an action to recover the damages provided for by this section or by any comparable provisions of Federal law."

The Federal Rules of Civil Procedure are involved, in particular Rules 15, 17 and 23. The relevant statute and federal rules are set forth in the Appendix (App. A at 1a).

Statement of the Case

The State of New Jersey, along with numerous other states and governmental entities, has brought a civil antitrust treble-damage action against General Motors Corporation, Ford Motor Company, and Chrysler Corporation (hereinafter "respondents") charging, *inter alia*, that respondents conspired in restraint of trade by withdrawing the special consideration granted to governmental fleet purchasers of motor vehicles. The jurisdiction of the District Court was invoked because the action arises under the federal antitrust laws. Petitioner asserts the right to enforce such laws as granted by Sections 4 and

16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. These actions have been consolidated and transferred, pursuant to 28 U.S.C. § 1407, for coordinated pre-trial proceedings in the Northern District of Illinois before the Honorable Frank J. McGarr.

Petitioner moved the District Court for leave to file an amended complaint pursuant to Rule 15(a), Federal Rules of Civil Procedure, and was granted permission to do so on July 18, 1973. Respondents moved the court below to dismiss the amended complaint. The District Court, in a memorandum opinion and order on March 7, 1974, then denied the motion for leave to file the amended complaint (App. B at 8a).

Petitioner sought to amend the original complaint in order to correct its mistake in form regarding the manner in which the action was brought. The New Jersey Antitrust Act is only four years old but no action was taken under the Act and no enforcement agency was created until two years after passage of the Act. This action was one of the first actions brought pursuant to Section 12(b) of the Act. Inadvertently and incorrectly the complaint was permitted to contain "class action" language along with the language setting forth the fact that the action was brought pursuant to Section 12(b). Petitioner's federal complaint forms were styled and patterned after the form of complaints filed by the petitioner, State of New Jersey, prior to the passage of the Antitrust Act. The powers granted to the Attorney General were new but our forms were old. Although petitioner was unfamiliar with the form of the pleading, our intent was clear throughout the course of the litigation that the action was brought by the Attorney General, on behalf of the State, pursuant to Section 12(b).

Section 12(b) manifests the State Legislative intent to create centralized antitrust enforcement by compelling the political subdivisions and public agencies of the State to obtain permission from the Attorney General before they may initiate antitrust actions under State or federal law. Rule 17(b) of the Federal Rules of Civil Procedure confirms the State's power to control capacity to sue by declaring that the State of incorporation determines the capacity to sue and be sued. Since State subdivisions were not granted permission to sue individually, by the institution of this suit the action was on behalf of one unitary plaintiff, the State, as the State is composed of all its agencies and departments.

To concisely set forth the right granted to the Attorney General and to rectify our error in form, we sought leave to file the amendments. However, Judge McGarr, without oral argument, denied the motion to amend and went beyond our mistake in form by interpreting Section 12(b) as changing the action into "a class action on behalf of all the unnamed political subdivisions of the State" (App. B at 10a). In addition, he found that the State could proceed on behalf of the State subdivisions and agencies "which become named plaintiffs and authorize the State Attorney General to represent them" (App. B at 10a). In misconstruing the plain words of the Act the District Court made no reference or comment on the permission provision of Section 12(b), or to the applicability of Rule 17 (b) of the Federal Rules of Civil Procedure. In order to prevent substantive rights of the Attorney General from being rendered a nullity we filed a timely Notice of Appeal from the District Court's order on March 29, 1974, and respondents moved to dismiss the appeal on the premise that it was not a final appealable order under 28 U.S.C. § 1291. By order of the Court of Appeals dated May 20,

1974, petitioner-appellant was permitted to respond to the motion to dismiss in its principal brief on appeal.

The Court of Appeals, in its July 22, 1974 order granting the motion to dismiss, found that the District Court order, within the framework of the *Cohen* doctrine of finality, was a claim of right collateral to, and separable from rights asserted in the primary action, but that it was not "too important to be denied review," and did not harm any substantive rights of New Jersey. Again, there was no mention of Rule 17(b), F. R. Civ. P., nor its relationship to the permission provision of Section 12(b) of the New Jersey Act. The Court of Appeals also confused Section 12(b) and the role of the Attorney General thereunder with the role of a class representative under Rule 23, F. R. Civ. P. The Court of Appeals concluded that:

> "Apparently, the difference between the original complaint and the proposed amended complaint is that in the latter, New Jersey sought to *represent* its political subdivisions without complying with the class action requirements of Rule 23, FRCP." (App. C at 12a n. 1.) (Emphasis supplied)

In so finding and in denying the appeal, the Court of Appeals restricts the historical power the states wield over their governmental agencies, disregards the clear language of both Rule 17(b), F. R. Civ. P., and Section 12(b) of the New Jersey Act, and nullifies State substantive rights.

Reasons for Granting the Writ

Because the lower courts have interpreted an important state statute inconsistently with ruling federal and state precedents, and thus drastically affected a national policy

favoring innovative antitrust enforcement, we begin with a brief overview of the fundamental rules supporting the right of a state to create a centralized antitrust authority, as exemplified by Section 12(b).

POINT I

Section 12(b) is grounded upon the Supreme Court's support for both control by the states over their governmental agencies and innovative legislative techniques, as well as the clear language of Rule 17(b) of the Federal Rules of Civil Procedure.

The nucleus of the State of New Jersey's unique antitrust enforcement program is Section 12(b) of the New Jersey Antitrust Act, N.J.S.A. 56:9-12(b). Section 12(b) authorizes the State, by its Attorney General, to bring antitrust actions on behalf of the political subdivisions and public agencies of the State. Moreover, governmental subdivisions and agencies may not initiate antitrust suits on their own behalf unless they first obtain the permission of the Attorney General to do so. By controlling the capacity to sue of State governmental agencies, New Jersey has created a centralized State antitrust enforcement agency and magnified both the potential to recoup past excess charges resulting from antitrust violations, as well as the investigative resources of the central antitrust authority.

Numerous benefits which accrue to all governmental units in the State, and the public at large, as a result of the unitary plaintiff created by Section 12(b), include (1) the ability to increase treble-damage or settlement recoveries by eliminating the capacity of State governmental units to "opt out" of any actions brought on their behalf;

(2) the ability to choose a broad-based State antitrust suit rather than permit fragmentized local actions; (3) the authority to present a unified, single and powerful plaintiff, the State, in the conduct of the litigation; (4) notice to the central enforcement agency of violations as yet unearthed by that agency, and (5) a central state clearing house for detecting and litigating antitrust violations with consequent savings to the public of time, manpower and money.

In denying petitioner's motion to amend its complaint, the lower courts apparently have been unmindful of the extent to which the States may control the powers of their own State agencies, and the extent to which this Court will support forceful State measures to combat antitrust violations. Clearly, the "common learning, found in all adjudications on the subject of municipal bodies and repeated by textwriters," *Meriwether* v. *Garrett*, 102 U. S. 472, 511 (1880), and as often repeated by this Court since *Dartmouth College* v. *Woodward*, 4 Wheat. (17 U. S.) 518 (1819), is that political subdivisions of a State are merely arms, creatures, and departments of the State, created as convenient agencies to exercise whatever State governmental powers may be entrusted to them. As municipal corporations, political subdivisions obtain all their powers from their creator, the State, by action of the State legislature.[1] Thus, any question as to the duration,

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[1] Interestingly, in finding that "[a] municipality is merely a department of the state," the Supreme Court, in *Trenton* v. *New Jersey*, 262 U.S. 182, 187 (1923), held:

> "In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state. *Id.*

(Footnote continued on following page)

extent or character of the powers of State departments can be resolved only by the supreme power of the sovereign State, "for it is a question that relates to the internal constitution of the body politic of the State." *Claiborne* v. *Brooks*, 111 U. S. 400, 410 (1884).[2] As Chief Justice Warren concluded in *Reynolds* v. *Sims*:

> "Political subdivisions of States-counties, cities or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." 377 U. S. 533, 575 (1964); *see Waller* v. *Florida*, 397 U. S. 387, 392-93 (1970) (Burger, C.J.)

This power over, and control by the State of its governmental units is distinctly acknowledged by the Federal Rules of Civil Procedure.

Rule 17(b) of the Federal Rules of Civil Procedure recognizes that the capacity to sue is determined by the State. *Chicago Title and Trust Co.* v. *Forty-one Thirty-six Wilcox Bldg.*, 302 U. S. 120, 124 (1937). In New Jer-

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(Footnote continued from preceding page)

The settled doctrine of the Court is that the State, conditionally or unconditionally, may expand or contract all powers of the municipal corporations which are the political subdivisions of the State, as well as destroy the corporation. *Hunter* v. *Pittsburgh*, 207 U.S. 161, 177-78 (1907).

[2] *See, e.g., Neuenschwander* v. *Wash. Suburban Sanitary Comm'n*, 187 Md. 67, 48 A.2d. 593 (1946); *Kelly* v. *Brunswick*, 200 Va. 45, 104 S.E.2d. 7 (1915); *Moses Lake School Dist.* v. *Big Bend Community College*, 81 Wash.2d. 551, 503 P.2d 86 (1973).

sey, municipal corporations and political subdivisions are granted the right to sue and be sued by the State Legislature. N.J.S.A. 40:18-3, 43-1, 69A-29 (e). Only if the subdivisions of a State have the permission to sue, may they be recognized as "persons" within the meaning of Section 4 of the Clayton Act, 15 U.S.C. § 15. *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390, 396 (1906). The State Legislature has chosen to subordinate the right to sue of State agencies, *i.e.*, the right to be a "person," to a unitary State action in deference to the policies underlying integrated State antitrust enforcement. Thus, Section 12(b) is consistent with Rule 17(b), F. R. Civ. P. and the unanimous body of law regarding State control over State governmental agencies.

The salutary effects of Section 12(b) are in accord with the Supreme Court's long-standing encouragement of private antitrust enforcement, and innovative legislative measures. The State Legislature, in fashioning the novel approach of Section 12(b) as a statutory weapon to combat the economic malignancy of antitrust violations, is consistent with the Supreme Court's steadfast support for the proposition that the States be granted "vast leeway in the management of [their] internal affairs." *Sailors* v. *Bd. of Educ.*, 387 U. S. 105, 109 (1967). As the States have extensive latitude to resolve their economic problems they have "constitutional authority to experiment with new techniques . . ." *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 423 (1952). Within the framework of the federal laws,

> "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is

declared by the legislature, to override it." *Nebbia* v. *New York*, 291 U. S. 502, 537 (1934).

"The importance of the question in the enforcement of the Sherman Law," *Georgia* v. *Evans*, 316 U. S. 159, 161 (1942), should not be abated by judicial obstacles thrown in the path of State legislative innovations. Section 12(b), far from being a mischievous creation, has the "[f]urtherance of the public good . . . written over the face of this statute from beginning to end as its animating motive." *Williams* v. *Mayor and City Council of Baltimore*, 289 U. S. 36, 41 (1933).

The New Jersey Legislature has devised a rational measure to eliminate the evils of lack of stringent antitrust enforcement and the loss of monetary recoveries resulting therefrom. Centralized enforcement and State control over the "opt outs" of an action optimizes antitrust deterrence by, *inter alia*, maximizing the potential State recovery. It is important to the welfare of New Jersey's antitrust program, as well as to the present and potential programs of all other States, that the court exercise its discretion in granting the petition for certiorari. In irremediably diluting the power the States possess over their agencies, the lower courts have abrogated the beneficial rippling effects which unique enforcement by each State in the Federal Union could have on antitrust enforcement in general. Judicial leeway for novel State techniques demands much more than a cursory and confusing denial of New Jersey's Constitutional right to control its governmental agencies and a dismantling of the centralized bureau created by Section 12(b).

POINT II

Section 12(b) is not in conflict with, and does not encroach upon the class action procedures of Rule 23.

There is no class action here, and Section 12(b) is not a subversion of, nor substitution for Rule 23 safeguards. Rather, Section 12(b) is in concert with the policies underlying class action Rule 23, such as the orderly administration of actions in the federal courts. However, there can be no class action on behalf of State subdivisions if there is no "class" of independent entities potentially capable of suing. The State Legislature subordinated the right to sue of State agencies to the greater good of a single centralized State action.

Generally, class members under Rule 23 are afforded notice of their rights and privileges. *Sanders* v. *John Nuveen & Co.*, 463 F. 2d 1075, 1082 (7th Cir. 1972). But, under the power granted by Section 12(b), once the State sues, the State governmental agencies and departments are ineluctably bound to the State action because they are the State. Procedural Rule 23 cannot be used to grant rights and privileges to State agencies which the State has not granted or has seen fit to control, regardless of the number of agencies that may be involved in the litigation.

The District Court turns both Section 12(b) and Rule 17(b), F. R. Civ. P. on their heads by confusing Section 12(b) with Rule 23[3]. Contrary to the explicit language of Section 12(b) requiring that State subdivisions and agen-

[3] It is important to note that this lawsuit is not a consumer class action under state law which might undermine Rule 23, but is an action solely on behalf of the State and its subordinate governmental arms.

cies request State permission to sue, the District Court's demand that the State obtain authorization from State subdivisions before actions are brought on their behalf by the State, *qua*, State, would permit the tail to wag the dog. The procedural safeguards which Rule 23 seeks to provide are applicable only where individuals or corporate entities possess the independent capacity to sue. The issue of manageability of this action by the District Court presents no difficulty since the departments and agencies of the State are managed, controlled and under the complete authority of the State.

In another context, Judge Bauer, in *Illinois* v. *Assoc. Milk Producers Inc.*, stated that:

> "Justice and judicial economy is best served by having the largest governmental unit sue on behalf of all its parts rather than having multiple suits brought by various political subdivisions within the State." 351 F. Supp. 436, 440 (N. D. Ill. 1972).

There can be no multiple suits by political subdivisions because the State has withdrawn from the subdivisions the power to sue unless the State authorizes such suits. The New Jersey Legislature, acting within the police powers of the State, has created an antitrust agency which is not burdensome on the federal courts or in conflict with federal rules. *See Joseph E. Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 45 (1966), *reh. denied*, 384 U. S. 967 (1966); *Sproles* v. *Binford*, 286 U. S. 374, 388 (1932). Section 12(b) merely simplified and solidified the state role in massive antitrust actions.

POINT III

The District Court Order falls squarely within the meaning of the *Cohen* doctrine of finality.

The concept of the "final judgment" rule emanates from 28 U.S.C. § 1291 (App. A at 1a). Historically, the question of appealability revolves around the competing considerations of "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507, 511 (1950). Professor Moore notes that the final judgment rule "will work injustice if inexorably applied", 9 J. MOORE, FEDERAL PRACTICE ¶110.07, at 109, (2d Ed. 1473), and that Section 1291 "has been liberally interpreted to authorize appeals from many decisions which are not 'final' within the ordinary meaning of that term." *Id.*, ¶110.01, at 48. The rigidity of the "final judgment" rule may be departed from where lower court rulings have attendant "serious public consequences." *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 124 (1945).

The major exception to the finality rule and the hardship which may result from its strict application, was enunciated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), which, coincidently, involved an appeal of a District Court order denying the applicability of a New Jersey statute to the pending federal action. The Supreme Court noted, "[t]he effect of the statute [28 U.S.C. § 1291] is to disallow appeal from any decision which is tentative, informal or incomplete," and that "[s]o long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal." *Id.*, at 546. The Court concluded that the District Court order

"did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably." *Id.* Holding that the District Court order would not affect or be affected by a decision on the merits and that the New Jersey statute applied in federal court, the Court found:

> "This decision appears to fall in tha' small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. [Citations omitted].
>
> We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." *Id.*, at 546-47.

In expanding upon the pragmatic theory underlying *Cohen* this Court concluded that with orders of "marginal" finality, and because time and money would be saved by resolving the issues involved "in light of the circumstances," the courts of appeals have the power to assert jurisdiction over issues "fundamental to the further conduct of the case." *Gillespie* v. *U. S. Steel Corp.*, 379 U. S. 148, 152-54 (1964).

The Supreme Court's most recent affirmation of the *Cohen* doctrine in *Eisen* v. *Carlisle & Jacquelin*, 94 S. Ct.

2140 (1974), held that the allocation of the cost of notice in a class action suit was a "final" order since it fell within *Cohen's* "small class" of collateral claims of right, unrelated to, and not an ingredient of, the merits of the cause of action. The Court made no mention of any requisite need to show "irreparable harm" to meet the *Cohen* standards, but rather relied on the fact that the order was not tentative or informal, and the issue was collateral and separable from the merits. In analyzing the *Eisen* decision's liberal use of the *Cohen* doctrine, the editors of the ANTITRUST & TRADE REGULATION REPORT opined that "[t]he Court reaffirms . . . the two-pronged test expounded in *Cohen*. . . ." *B. N. A. A. T. R. R.*, No. 680, at B-4 (Sept. 17, 1974).

The Seventh Circuit, having found that *Cohen* requires a three-pronged test, decided that the order below "may qualify" as a "final decision" since it was "separable from and collateral to" the principal action (App. C at 14a). However, the Court of Appeals did not agree that the order was "too important to be denied review" or that substantive rights of the State had been extinguished.

Clearly, the order *sub judice*, is anterior to and not entwined in the legal and factual antitrust questions of the underlying action.[4] The District Court order was not tentative or informal, but decided on the merits the rights granted to the Attorney General by the State in Section 12(b). This is no trivial error of law, nor a subtle diversion of contested State's rights. Rather, the order below is an excessive erosion of the power reserved to the States to control their governmental agencies, as well as a re-

[4] *Cf. Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963).

fusal by the courts below to heed the directive of Rule 17(b), F. R. Civ. P., that the States control the capacity to sue. These decisions not only stifle the flexibility and creativity of New Jersey's Act but ignore and thus substantially corrupt, the power all States constitutionally wield over their units of government.

The New Jersey action is only one of the numerous actions in a complex antitrust litigation. Even measured by optimistic standards, years of protracted litigation may await all plaintiffs. If petitioner must await the outcome of the principal litigation before asserting the rights granted by Section 12(b) the precious benefits which that section provides will be a nullity. Practically, subdivisions and agencies of the State have often "opted-out" of class actions by inadvertence, negligence, or confusion. Thus, the State Legislative determination to eliminate any opt-outs from the State action, in order to ensure a full monetary recovery to which State subdivisions are entitled, would be invalidated if the decisions below are permitted to stand.

The courts have effectively dismembered the governmental arms from the corporate body of the State. In addition our future conduct and behavior in this case has been drastically affected, vis-a-vis any settlement negotiations and damage recoveries. Consequently, petitioner has been placed in a fatal vise by the Court of Appeals, since denial of review may "render impossible any review whatsoever" of our claim. *See United States* v. *Ryan,* 402 U. S. 530 (1971). If we must bide our time until a judgment in the primary action in order to preserve our rights on appeal, then Section 12(b) remains inoperative while our subdivisions are left unprotected. On the other hand, if we must move the District Court to certify a class of political subdivisions under Rule 23 in order to ensure a re-

covery for State agencies, then we moot our issue on appeal, and must proceed in the action contrary to the State Legislative mandate which sought to create a single, unified plaintiff, and centralized enforcement.

This issue is "too important to be denied review" because it calls into question this Court's continued and repeated support for stringent antitrust enforcement and innovative State legislative measures. Unquestionably, the overriding national importance of these policies and the State policy embodied in Section 12(b) have "serious public consequences." Economic reality demands that the States discover novel but legitimate means of protecting the "business or property" of State government. The public demands efficiency in government while petitioner's attempt at increasing the efficiency of antitrust deterrence has been rendered nugatory. The form in which the issue arises should not triumph over the substance of the statute or the antitrust policies expressed by this Court.

POINT IV

The Court of Appeals erred by not reviewing the abuse of discretion by the District Court in refusing to permit the motion to amend.

The amendments to petitioner's complaint were filed under Rule 15(a), F. R. Civ. P. The definitive rule announced by the Supreme Court to control the trial court's discretion in dealing with motions to amend was expressed in *Foman* v. *Davis*, 371 U. S. 178, 182 (1962). The Court in *Stack* v. *Boyle*, 342 U. S. 1, 13 (1951), concluded that "[t]he Appellate Court should only reverse for clear

abuse of discretion or other mistake of law."[5] Similar to the present situation, the Seventh Circuit found, in *Exmoor Country Club* v. *United States*, that:

> "In this case the facts are not in dispute. The problem is one of construction, i.e., the application of the . . . statute. In such situations, where the ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact, it is subject to judicial review, and on such review the appellate court may substitute its judgment for that of the trial court." 119 F. 2d 961, 963 (7th Cir. 1941).

Reversal may be ordered where the trial court "was in error as a matter of law" and thus abused its discretion.[6]

Technicalities concerning the form of the motion may not govern when the trial court has erred as to a matter of law. In reviewing the motion to amend in order to correct a mistake in the form of the original complaint, the District Court regarded the amendments as seeking to create a class action in avoidance of Rule 23. But, the District Court did not apply the clear rule of law in Rule 17(b), Federal Rules of Civil Procedure, nor even refer to the permission provision of the New Jersey Antitrust Act. The District Court has the responsibility to ensure that motions addressed to the pleadings comport with the standards of *Foman* v. *Davis, supra, e.g.*, determining whether prejudice will result to a party. But where, as

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[5] "[A]n exercise of discretion based on misconception of the law is an abuse of discretion." *Lipsett* v. *United States*, 359 F. 2d 956, 959 (2d Cir. 1966).

[6] *Beck* v. *Wings Field, Inc.*, 122 F.2d 114, 116 (3d Cir. 1941). *See Bowles* v. *Simon*, 145 F.2d 334, 337 (7th Cir. 1944).

here, the District Court made a mistake of law regarding a collateral issue which irreparably damaged substantial rights of petitioner, and, in general, reduces the power all states possess over their subdivisions, the order is ripe for review.

CONCLUSION

For the reasons discussed herein, it is respectfully urged that *certiorari* should issue to review the decision of the court below.

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